

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(San Jose, California)

**TCI CABLEVISION OF CALIFORNIA
d/b/a HERITAGE CABLEVISION
Employer**

and

**JOHN WINN, An Individual
Petitioner**

Case 32-RD-1329

and

**SALES AND DELIVERY DRIVERS,
WAREHOUSEMEN AND HELPERS
UNION, LOCAL NO. 296,
affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, AFL-CIO
Union¹**

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The Union's name has been modified to reflect its affiliation with the AFL-CIO.

² Briefs filed by the Employer and the Union have been duly considered. No other briefs were filed.

2. The parties stipulated and I find that the Employer, a California corporation, and a wholly owned subsidiary of TCI West, Inc., a Delaware corporation, with an office and facility located in San Jose, California, its only facility involved herein, is engaged in the business of providing cable TV installation and service to individual homeowners. During the previous twelve months the Employer received gross revenues in excess of \$500,000 from its retail customers. During the same period, the Employer purchased and received goods valued in excess of \$5,000, which goods originated from suppliers located outside the state of California. Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. Accordingly, the assertion of jurisdiction is appropriate herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The sole issue to be determined herein is the status and eligibility to vote of installation crew chief John Winn, the Petitioner herein. The Union contends that Winn is a supervisor within the meaning of Section 2(11) of the Act and that accordingly, the petition should be dismissed. The Union also contends that Winn is ineligible to vote in the election because he is performing the work of trainer, a classification specifically excluded by the parties' most recent collective bargaining agreement. Both the Employer and Winn dispute that he is a supervisor within the meaning of Section 2(11) of the Act or that he is otherwise ineligible to vote because of his training responsibilities.

David Walton, area director, manages the Employer's San Jose television cable installation facility. Technical manager Mark Solins reports to Walton. Seven installation supervisors report to Solins, each with a different area of responsibility. Each supervisor supervises about 20 bargaining unit installers and technicians. There are about 180 to 185 bargaining unit employees.

The record indicates that a crew chief is assigned for every 8 to 10 crewmembers; however, in addition to Winn, there are only seven other employees with the title installation crew chief. The installation crew chief position is described in the collective bargaining agreement and specifically included in the bargaining unit. Installation crew chiefs are selected for their experience and expertise so that they can help other employees with problems in the field.

Winn has been employed by the Employer for twelve years. He was hired as an installer and worked in that position for two years. He was then promoted to installation crew chief and has worked in that position up to the present. About two years ago his duties were expanded to include training new hires.

Winn works Monday through Friday from 7:30 a.m. to 4:30 p.m., the same hours as the other crew chiefs. His immediate supervisor is Robert Green, who also supervises other installation crew chiefs. Winn's current wage rate is \$17.53 per hour, which includes a \$2.00 deferential for crew chief pay. The crew installers are paid between \$10.25 and \$15.59 per hour. Winn receives the same contractually provided benefits as the other installers. There are no additional benefits or privileges that he receives by virtue of his position as crew chief. Winn punches the same time clock as the other installers and crew chiefs.

Prior to about a year and a half ago, the Employer assigned the training of new employees to its regional division, also located in San Jose. However, because of differences in the San Jose plant from other cable facilities in the region, and other complications unique to the San Jose plant, the Employer determined that it was best that it be responsible for training its own employees. Thus, installation crew chief Steve Morioka was assigned to perform training. Thereafter, upon Morioka's promotion to supervisor, installation crew chief Winn was assigned to perform the Employer's five-week "first step" training of new hires.

Winn's crew is comprised of groups of newly hired installers. Winn usually works at a desk in the training room, but has not done so lately due to remodeling of the Employer's facility. Winn trains between six to twelve installers at a time in the training room as well as outdoors. In addition, Winn makes sure that the new hires sign the appropriate paperwork for their assigned tools. Winn maintains paperwork such as training logs to keep track of what functions the installers have been trained on. Winn purchases some supplies such as wall patching materials. However, prior to a purchase he submits a purchasing order to a supervisor for approval.

Green oversees Winn's first step training function by insuring that he has the proper training materials and that he instructs in the proper training procedures and installation guidelines. Green is present in the training room for brief periods on a daily basis while Winn is conducting the training. When Winn is absent, the trainees are sent out in the field to observe installations as ride-alongs. Winn plays no role in developing the training curriculum that is issued by the Employer's regional training department. Upon completion of the five-week training program, Winn notifies the new hires that they have successfully completed the program and they are issued a certificate of achievement by their supervisors. Winn signs the certificates. Thereafter, the installers are assigned to

the existing crews. Winn plays no role in the decision as to which crew the new employee is assigned. That decision is made by Green based on his own observations and judgment. The crew chiefs to which a new hire is assigned also play a role in the training of new employees. Thus, the crew chiefs are responsible for continuing to train new hires in practical field applications.

Winn does not evaluate the installers on his crew. However, he tests employees on a daily basis during the training period. Winn is responsible for administering both a written test and a practical pole-climbing test. Winn is designated as the proctor or certified trainer on both test forms. The written tests are multiple choice tests. Winn marks the correct and incorrect answers and submits the tests to Green for his review. If an employee is receiving low test scores on the written test, Green discusses the matter with the employee. Not all new hires who complete the training become regular employees. Green makes the determination as to whether the employee has sufficiently completed the training period so as to become a regular employee assigned to a crew.

With regard to the pole-climbing test, certification and recertification is required by the Employer. The testing performed by Winn determines whether an employee is certified. Winn decides whether the employees have executed the techniques properly based on a two-page list of competencies including foot and hand coordination, dismounting, and spiraling. As with his supervision of Winn's classroom training, Green is present on a daily basis to observe the pole-climbing certification. If there are any problems or matters that Winn has missed, Green brings them to Winn's attention. Winn designates the installer's performance in the various categories as "pass," "fail," or "needs work". Although Winn has never failed an installer on the pole test, if an installer is having difficulty climbing, or is climbing in an unsafe manner, Winn works with that person to improve. On one occasion after working with an employee who was having difficulty, Winn brought the situation to Green's attention. Green independently reviewed the employee's performance and decided that he should not continue in the training program.

Winn has no authority to promote employees. However, in addition to the five-week training program, any installer who wishes to be considered for promotion must undertake a practical test that includes pole-climbing. Winn performs the practical testing necessary to qualify for the promotion. All of the employees who have attempted the certification for advancement or promotion have eventually passed the pole-climbing test, although some have had to take the test more than once, or have scored high enough on the other aspects of the practical test to compensate for inadequate pole-climbing. Thus, a certain employee did poorly on the pole test, but was nevertheless promoted because of his overall test score. When employees seeking promotions have trouble pole-climbing, Winn works with them in the same fashion as he works with new hires during initial training, i.e., until they can pass the test. It is not clear whether

Winn uses the same two-page list of competencies used for initial pole-climbing certification, or whether he uses an independent form of assessment. Nor is it clear what happens in the promotion process after an employee qualifies for promotion by passing the practical test. Thus, whether Winn plays any part, other than administering the practical test, in the decision to promote an employee is not evident.

Between training classes, Winn performs field installations. Winn may work in the field for a few days or a few weeks between training classes. Although the record is somewhat equivocal, it appears that while working in the field between training classes, Winn retains his position as crew chief, floating between crews as needed. Supervisors prepare pre-assigned work packets that Winn hands out to his crew. While working in the field, Winn assists in and coordinates the installation work of the installers. Thus, if certain installers are falling behind, he coordinates assistance by other installers. At times, he performs the assistance himself in order to complete the daily workload. He provides the same type of on-going training in the field that the other crew chiefs perform for newly hired and trained employees. When working in the field, Winn carries more supplies than the crewmembers and has occasion to distribute those supplies to the installers as needed. If an installer is absent from the crew and a floater is not assigned to replace that person, or it is not possible to redistribute or reschedule his or her work, Winn or another crew chief performs the work assigned to the absent installer. Winn has occasion to observe the work quality of the installers. If the workmanship is poor, such as when an installer tacks or routes the cable in the wrong direction, he corrects the work.

Winn attends weekly crew chief meetings to discuss upcoming issues, although the nature of such issues is not identified in the record. The meetings are conducted by one of the supervisors. In addition to the crew chief meetings there are regularly conducted supervisors meetings. Winn and the other crew chiefs do not attend the supervisors meetings. There are also employee or staff meetings held on a regular basis conducted by the supervisory staff. Winn has spoken at these meetings regarding installation procedures and, at one meeting, he provided some training to the installers.

Winn does not have the authority to hire employees. However, he does participate in the screening of prospective applicants at job fairs. The record indicates that Winn performs this function with volunteers from the bargaining unit. Winn and the volunteer screeners ask applicants questions from a prepared list and record their responses. The responses are placed in the Employer's files. Thereafter, the Employer's supervisors perform interviews of the applicants. Two of the employees screened by Winn in the last year were hired. The record does not indicate what steps were taken after the interview that led to the hiring of these employees, or what role the screened responses recorded by Winn and other bargaining unit members played in the decision to hire the employees. Other than

the screening process, Winn plays no further role in any other aspect of the hiring process. All employees are free to make referrals for employment. Winn has done so, but none of his referrals have been hired.

Winn has no authority to fire, suspend, schedule, layoff, recall, transfer, or to recommend such actions. He has never substituted for a supervisor. Thus, when Green was recently on an extended medical leave, rather than assigning his responsibilities to Winn, those supervisory functions were assigned to other supervisors.

Winn does not have the authority to discipline employees. He has never given a verbal or written warning. However, Winn has relayed the information that the installers have neglected their work to their supervisors. The record does not indicate what further action, if any, was taken by the supervisor based on the information relayed by Winn.

If an employee comes to Winn with problems or complaints regarding working conditions or pay, Winn does not attempt to resolve the problem. Rather, he refers the employee to a supervisor.

Winn has never granted time off to employees. A supervisor must approve time off. The employees on Winn's crew refer such requests to Green. Thus, recently when a new hire had a family emergency and requested time off, Winn referred the request to Green who referred the request to supervisor Longton, who referred the request to manager Mark Solins who granted the request.

When the occasion to work overtime arises, volunteers are requested. If there are not enough volunteers for the work that needs to be done, Winn and Green request more. There is nothing in the record to indicate that Winn has ever required that any employee work overtime.

Section 2(11) of the Act defines a supervisor as one who possesses "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

In deciding whether Winn is an employee or a statutory supervisor, the burden of establishing whether or not he possesses statutory indicia is on the Union, which, in this proceeding, is asserting such status. Bennett Industries, 313 NLRB 1363 (1994). Moreover, in a proceeding where a finding of supervisory status would lead to the dismissal of the petition, in making determinations regarding supervisory status, "the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor

is denied employee rights which the Act is intended to protect.” Westinghouse Electric Corporation v. NLRB, 424 F. 2d 11541, 1158 (7th Cir. 1970, cert. denied 400 U. S. 831).

The record establishes that Winn has no authority to transfer, suspend, layoff, recall, discharge, reward, or adjust grievances. Additionally, his responsibilities at the job fails to record applicants’ answers to pre-printed questions do not establish that he effectively recommends hire. International Center, 297 NLRB 601, 602 (1990) (screening applications insufficient to establish effective recommendation to hire). Similarly, although the Union contends that reports Winn makes to supervisors that installers are neglecting their work constitute effective recommendations to discipline, there is no evidence in the record that the Employer accepted these recommendations and took disciplinary action against the employees. See Northcrest Nursing Home, 313 NLRB 491, 497 (1993). Although it is clear that when Winn works in the field he gives installers directions to keep them from falling behind or to re-work mis-routed cable, such direction appears to be routine, rather than indicative of the responsible direction required by Section 2(11). See Extendico Professional Care, 272 NLRB 599 (1984). While Winn has the responsibility to train employees, that responsibility derives from his 12 years of experience with the Employer. Rather than exercising independent judgment in fulfilling these responsibilities, he is implementing guidelines determined by the regional office under the daily supervision of his supervisor who ultimately decides independently whether employees have successfully completed the training program and are qualified to be assigned to work as installers for the Employer. Hogan Manufacturing, 305 NLRB 806, 807 (1991) (conducting tests and inspecting work indicative of technical competence rather than supervisory status); see also Brown & Root, Inc., 314 NLRB 19, 23 (1994). Finally, while Winn assesses the performance of installers seeking promotion via the practical pole-climbing test, the record does not establish how Winn determines success on the practical test, whether his assessments are based on independent judgment, what role Green, who closely monitors Winn’s evaluation of new hire performance in the training program testing, plays in the practical testing, or whether Winn’s determination that the pole test has been passed is the only criteria used to determine whether an employee will be promoted or not. Thus, there is insufficient evidence to determine whether Winn’s role in administering the practical test constitutes effectively recommending promotion requiring the exercise of his independent judgment. In sum, the Union has failed to meet its burden to establish that Winn possesses sufficient authority to warrant a finding of supervisory status under the Act. Based on the foregoing and the record as a whole, I conclude that Winn is not a supervisor within the meaning of Section 2(11) of the Act. Further, since Winn, the Petitioner, is not a statutory supervisor, I shall direct an election herein.

Although as noted above, the position of crew chief is included in the bargaining unit, the position of trainer is specifically excluded in the recognition

clause of the parties' collective bargaining agreement. At the close of the hearing the Union took the position that since Winn has been performing in the capacity of trainer, he is not properly included in the unit and is, therefore, ineligible to vote. The record indicates that there are no employees employed at the Employer's San Jose facility as "trainers". There is nothing in the collective bargaining agreement or otherwise in the record to explain why the parties saw fit to exclude trainers from the recognition clause. However, Article XXXII of the collective bargaining agreement provides that formal training functions may be carried out by "either supervisors and/or experienced bargaining unit employees..." In any event, inasmuch as Winn is classified as a crew chief, a position specifically included in the unit, and because he spends a significant amount of time between training classes performing installation, his exclusion from the unit is not warranted, notwithstanding his training duties. Thus, since Winn works in close proximity with the installers and crew chiefs, shares the same supervision in the person of supervisor Green, and shares the same wages, benefits, and working conditions, his community of interest with them is sufficient to warrant his inclusion in the unit. Continental Cablevision, 298 NLRB 973 (1990), (dual function employees eligible to vote where their job duties show that they have a substantial interest in working conditions of the unit). Moreover, if performance of training duties is sufficient to exclude an employee from the unit, it would follow that all of the crew chiefs should be excluded from the unit since the record is clear that the crew chiefs perform training duties in the field for the new hires assigned to their crews. The Union does not seek such a result. Based on the above and the record as a whole, I shall include Winn in the unit found appropriate herein.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time installer trainees, installers, advanced installers, technician trainees, installer technicians, service technicians, system technicians, advanced technicians, construction trainees, construction persons A, construction persons B, dispatcher trainees, dispatchers, warehouse person trainees, and warehouse persons employed by the Employer at its San Jose, California facility; excluding all office clerical employees, receptionists, customer service representatives, guards, and supervisors as defined in the Act.

There are approximately 185 employees in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.³ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by, **SALES AND DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 296, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care 359 Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before, March 11, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

³ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 18, 1999.

Dated at Oakland, California this 4th day of March, 1999.

/s/ James S. Scott

James S. Scott, Regional Director
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